

FILE COPY

Office - Supreme Court, U. S.

RECEIVED

JAN 9 1939

CHARLES F. MORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1938

No. 367

FRANK EICHHOLZ, Appellant,

vs.

**PUBLIC SERVICE COMMISSION OF THE STATE
OF MISSOURI ET AL.**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MISSOURI**

BRIEF OPPOSING APPELLEE'S MOTION FOR BOND

**D. D. McDONALD,
FRANK E. ATWOOD,
SMITH B. ATWOOD,**
Attorneys for Appellant,
Jefferson City, Missouri.

A

be
00
ne
th
ac
m
to

er
th
by
th
w
tr
na
be
of

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 367

FRANK EICHHOLZ, Appellant,

vs.

**PUBLIC SERVICE COMMISSION OF THE STATE
OF MISSOURI ET AL.**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MISSOURI**

BRIEF OPPOSING APPELLEE'S MOTION FOR BOND

Appellee has filed a motion to require appellant to give a bond in the amount of Twenty-five Thousand Dollars (\$25,000) "to secure and protect appellee in the amount of fees now owing by appellant to the State of Missouri * * * ." It appears that appellee is asking for affirmative remedial action in aid of a cause which has passed the stage when remedial action may be properly granted. Several reasons occur why the motion should be denied.

First: This case has now reached the stage when alleged errors are being considered and reviewed. Whatever remedy appellee was entitled to is a matter of proper consideration to the trial court. We have never understood that it was the proper function of a court of review (except in matters in which it has original jurisdiction) to assume the duties of a trial court, or to make direct or auxiliary orders of a remedial nature affecting the merits of the case. Any such orders must be limited by, and made pursuant to the statutes and rules of appellate practice.

Second: We find no precedent for such motion in the rules of this Court. All motions referred to in these rules appear to invoke some proper action affecting appellate practice. No such motion contemplates action by this Court on matters properly for the consideration of the trial court.

Third: Motion should have been filed with and passed on by trial court (and in fact was).

Fourth: All that we have stated in our brief anent the counterclaim may be restated here in opposition to the motion:

(1) Appellee has not alleged or proved its authority to sue for or to receive the fees sought to be secured by the bond. In this respect the counterclaim fails to state a cause of action and should never have been entertained by the trial court.

(2) The counterclaim attempts to set up a cause of action at law for the recovery in a purely equitable action of injunction. Equity Rule 30 prohibits such practice.

(3) By reason of the limitation of Equity Rule 30, the trial court had no jurisdiction of the counterclaim.

(4) The record affirmatively shows the counterclaim was never admitted as an issuable pleading in the course of the trial. The appellant had no knowledge that it was being considered; no evidence was offered in support of it. Consequently the judgment on the counterclaim deprives applicant of his property without the due and orderly processes of the law.

For these reasons we respectfully urge that the motion be denied.

Respectfully submitted,

D. D. McDONALD,
FRANK E. ATWOOD,
SMITH B. ATWOOD,
Counsel for Appellant.

✓

